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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

NOLAN DEMETRIUS JACKSON,

Defendant and Appellant.

D054178

(Super. Ct. No. SCE279551)

APPEAL from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed.

A jury convicted Nolan Demetrius Jackson of several offenses arising out of events involved in domestic violence and possession of a firearm. Prior to sentencing, Jackson wrote letters to the court raising concerns about the trial. The trial court appointed special counsel to consider whether to file a motion for new trial. At the time of the hearing on such motion, special counsel declined to file a motion for new trial and explained his reasons at length for the benefit of Jackson and the court. Because counsel explained his reasons, Jackson now argues he was denied counsel on his motion for new

trial and claims he is entitled to reversal of his convictions. We will find Jackson was provided effective assistance of counsel under *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*), and affirm his convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Jackson was convicted, following a jury trial of multiple counts. He was convicted of making a criminal threat (Pen. Code,¹ § 422), with a firearm enhancement pursuant to section 12022.5, subdivision (a); drawing or exhibiting a firearm (§ 417, subd. (a)(2)); possession of a firearm by a felon (§ 12021, subd. (a)(1)); carrying a loaded firearm (§ 12031, subd. (a)(1)); and resisting an officer (§ 148, subd. (a)(1)). The court found true two strike priors within the meaning of section 667, subdivisions (b) through (i) and a serious felony prior conviction within the meaning of section 667, subdivision (a)(1).

The court appointed George Cretton to represent Jackson for the limited purpose of determining whether there was any viable basis for a motion for new trial. Following a review of the transcripts and documents, Mr. Cretton determined there was no basis for the filing of a motion for new trial. Trial counsel, George Osper, remained as appointed counsel throughout the process. After considering Cretton's decision not to file a motion for new trial, the trial court treated Jackson's letters as a motion for new trial and denied the motion. Jackson was sentenced to a determinate term of 13 years, 4 months.

¹ All further statutory references are to the Penal Code unless otherwise specified.

Since Jackson does not challenge the admissibility or the sufficiency of the evidence to support the convictions, we will not set forth a statement of facts. Suffice to note that these offenses arose from a relationship between Jackson and the victim of the threats. At the time of Jackson's arrest a firearm was found two feet from the place where Jackson fell. His prior convictions were proved at a court trial.

DISCUSSION

Jackson contends that Cretton "argued against him" in the motion for new trial. From that premise Jackson argues he was denied counsel on the new trial motion and is entitled to automatic reversal citing *U.S. v. Cronin* (1984) 466 U.S. 648 (*Cronin*). In the alternative, he argues that he was denied effective assistance of counsel under *Strickland, supra*, 466 U.S. 668. We believe Jackson has materially mischaracterized the role that Cretton played in his limited appointment. Accordingly, we believe there is no basis for a finding of denial of counsel, because Cretton's role was to assess *whether* there was a viable basis for a motion for new trial. He fulfilled that role by carefully analyzing the record and the potential issues.

We will further find that there is no showing on this record that Cretton was ineffective in his analysis of the record in this case. Under *Strickland, supra*, 466 U.S. 668, trial counsel has no obligation to file nonmeritorious motions.²

² We note that Jackson has not raised a claim that trial counsel (Osper) was ineffective, nor has he offered any argument as to why there might have been a viable motion for new trial that could have been made in the trial court.

A. Alleged Denial of Counsel.

Relying on *Cronic, supra*, 466 U.S. 648, Jackson argues he is entitled to an automatic reversal because he was completely denied counsel on his new trial motion. Jackson bases his claim on the fact that Cretton pointed out to the court and Jackson the reasons why he did not believe he should file a motion for new trial. *Cronic* does not support Jackson's claim.

Although the court in *Cronic, supra*, 466 U.S. 648, noted that a person who is completely denied the right to counsel has suffered per se reversible error, the court did not find that *Cronic* had suffered such denial. The court recognized that *Cronic*'s appointed lawyer was relatively inexperienced and had limited time to prepare, but still concluded *Cronic* had in fact been represented and reversed the decision of the appellate court, which had applied an automatic reversal doctrine. Instead, the court remanded the case for a determination of whether *Cronic* was denied effective assistance of counsel in light of *Strickland, supra*, 466 U.S. 668. (*Cronic, supra*, at p. 667.)

Jackson also relies on *King v. Superior Court* (2003) 107 Cal.App.4th 929 (*King*), to support his argument for automatic reversal. The present case is distinguishable from the *King* case.

In *King, supra*, 107 Cal.App.4th 929, the defendant had assaulted or made death threats to a series of appointed counsel. The prosecution brought a motion to declare that *King* had forfeited his right to counsel by his constant attacks on appointed counsel. After a hearing, in which *King*'s most recent appointed counsel appeared, the trial court

declared King had indeed forfeited his right to counsel. King sought writ relief in the appellate court.

In a lengthy discussion the Third District Court of Appeal examined the doctrine of forfeiture of counsel and concluded King had not been adequately warned of the consequences of his behavior and that the trial court had failed to explore less drastic methods of getting the case to trial in the face of King's persistent violence and threats of violence against counsel.

At the end of its opinion, the court noted that then present trial counsel had effectively argued against King. Counsel disclosed King's threats that had been made out of court and essentially spoke against King in connection with the forfeiture motion. (*King, supra*, 107 Cal.App.4th at pp. 949-950.) The court applied the principles of both *Strickland, supra*, 466 U.S. 668 and *Cronic, supra*, 466 U.S. 648, and held that King was entitled to be effectively represented in the contested motion proceeding and that his counsel had actively opposed King's interests, thus denying him the Sixth Amendment right to counsel.

The circumstances in this case are much different than those presented in *King, supra*, 107 Cal.App.4th 929. Here, counsel (Cretton) was appointed for a very limited purpose. Jackson, although represented by trial counsel, had sent postconviction letters to the trial court complaining about his conviction and his trial counsel. The court, out of an abundance of caution, followed trial counsel's advice and appointed Cretton for the purpose of examining the issues raised in Jackson's letter in order to determine if a formal motion for new trial should be filed. Cretton fulfilled that duty by examining the issues

and the record and concluded there was no viable basis for filing a motion for new trial. There is no constitutional requirement that counsel must file frivolous motions or advocate for meritless positions in order to provide effective representation. (*People v. Mattson* (1990) 50 Cal.3d 826, 876.) It is sufficient here that Cretton did the appropriate investigation and made a reasoned tactical decision.

B. Jackson Received Effective Assistance of Counsel

Jackson's alternative argument is that Cretton was ineffective in his representation regarding Jackson's hoped-for motion for new trial. It is clear that a motion for new trial is a critical stage in the criminal trial and that a defendant is entitled to effective assistance of counsel. (*People v. Munoz* (2006) 138 Cal.App.4th 860, 867-868.) The standard for determining effective assistance of counsel is set forth in *Strickland, supra*, 466 U.S. 668. On review, defense counsel's actions are entitled to a presumption of reasonableness. (*Id.* at p. 689.) Where counsel's decision to act or not to act is the result of an informed tactical choice, the conviction will be affirmed. (*People v. Diaz* (1992) 3 Cal.4th 495, 557.) Trial counsel is not required to make futile objections or to bring meritless motions. (*People v. Harpool* (1984) 155 Cal.App.3d 877, 886.)

This record clearly establishes that Cretton made an informed tactical decision to refrain from bringing a motion for new trial. He explained his reasons at length on the record. Neither trial counsel (Osper) or the court found fault with Cretton's analysis of the issues raised by Jackson in his letters to the court. It is also significant that Osper did not raise any separate basis for a new trial motion.

Finally, we note that Jackson has failed to identify any error in Cretton's analysis of the viability of a new trial motion. His argument is simply that Cretton was ineffective because he did not bring a new trial motion on the grounds Jackson raised in letters to the court. Such bald assertion, devoid of basis in the record, cannot serve as grounds to find a Sixth Amendment violation.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.